U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 0 6 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen or reconsider that decision, which was granted and the original decision affirmed. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed an appeal of that decision, which was rejected by the AAO. The matter is now before the AAO on motions to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a business and tax consulting services company. It seeks to permanently employ the beneficiary in the United States as a management analyst. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The petitioner filed a motion to reopen and reconsider the director's decision, in which the director affirmed the previous findings. On June 13, 2012, the AAO dismissed the appeal, holding that the petitioner failed to establish its ability to pay the proffered wage from the priority date onwards. The petitioner then filed an appeal of the AAO decision. The resulting February 21, 2013 decision rejected the appeal as no right to appeal an AAO decision exists. The petitioner then submitted the instant motion to reopen and reconsider. We will accept the motion to reopen the matter based on the new information submitted. Thus, the motion to reopen is granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

As set forth in the director's October 19, 2007 and May 26, 2010 decisions and the AAO's June 13, 2012 decision, the issue in this case is whether the petitioner has established his ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on February 8, 2007. The proffered wage as stated on the ETA Form 9089 is $31.20 per hour ($64,896.00 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to currently employ six workers. On the ETA Form 9089 the beneficiary claims to have been employed by the petitioner for 32 hours per week since November 30, 2006.

In the AAO's June 13, 2012 decision, we specifically reviewed evidence of the petitioner's ability to pay both the proffered wage and his personal household expenses in the form of Internal Revenue Service (IRS) Forms W-2 from 2007 through 2010 and the petitioner's IRS Forms 1040. The AAO's decision stated that the petitioner did not establish its ability to pay the proffered wage in any of the years for which evidence was submitted. In addition to Forms W-2 stating wages paid by the petitioner to the beneficiary of $39,144.08 in 2007, $39,837.83 in 2008, and $38,584.92 in 2009 and 2010 paystubs stating wages paid through June of $18,510.30, the AAO decision examined the petitioner's adjusted gross income to determine whether it was an amount sufficient to allow the petitioner to meet the household obligations and pay the proffered wage.[2] Specifically, the AAO decision cited inconsistencies in the household expenses claimed by the petitioner such as a failure to consistently list education expenses, automobile insurance expense, or credit card expenses for the relevant years and a discrepancy between the medical expenses, property tax, and state tax listed on the household expenses when compared to the sole proprietor's Forms 1040 Schedule A for the relevant years. The AAO's previous decision cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), and requested evidence to resolve the discrepancies. No such evidence was submitted with the instant motions.

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[2] A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

In addition, the previous AAO decision stated that the petitioner had not demonstrated its ability to pay the proffered wage because USCIS electronic records indicate that the petitioner has filed additional immigrant and non-immigrant petitions which have been pending simultaneously. The previous AAO decision specifically stated that the petitioner must demonstrate its ability to pay the proffered wage to all sponsored workers. No such evidence was submitted with the instant motion.

With the instant motion, the sole proprietor submitted IRS Forms W-2 reflecting that he paid the beneficiary $42,170.30 in 2010, $43,680.00 in 2011, and $46,166.76 in 2012. These amounts are all less than the proffered wage; in 2010, the deficiency is $22,725.70; in 2011, the deficiency is $21,216.00; in 2012, the deficiency is $18,729.24. The sole proprietor also submitted his 2010 and 2011 IRS Form 1040 stating adjusted gross income of $153,737 and $161,411, respectively. The petitioner did not submit a statement of household expenses for those years nor did it submit evidence of the other sponsored workers' proffered and actual wages so that we are unable to determine whether the petitioner had the ability to pay the proffered wage to the instant beneficiary for these years.[3]

With the motion, the petitioner argues that the company's net income should be used to calculate the petitioner's ability to pay the proffered wage. As stated above, the petitioner is a sole proprietor. As a result, the company's funds are not separate from its owner; income, credit, deductions, and the like are reported on the personal tax return, the IRS Form 1040. The sole proprietor, therefore, must demonstrate his ability to meet all of his household financial obligations as well as the obligation to pay the proffered wage. The company's net income cannot be considered in isolation. As stated above, the sole proprietor did not submit evidence demonstrating his ability to meet his household obligations as well as his obligation to pay the proffered wage to the instant beneficiary or the other sponsored workers.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States

[3] As the petitioner did not resolve the inconsistencies between his Schedule A expenses and statement of household expenses noted in the previous AAO decision, we will not extrapolate from the expenses in 2007 through 2010 to determine whether he had sufficient AGI to cover both the proffered wage and his personal household expenses in 2011.

and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. As stated in the previous AAO decision, there are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses during the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. Showing that the company's net income exceeds the proffered wage is insufficient as a sole proprietor must also demonstrate his ability to meet his household financial obligations as well. Finally, the record contains unresolved inconsistencies pertaining to the petitioner's claimed annual household expenses and his failure to account for the simultaneously pending immigrant petitions. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted and the decision of the AAO dated June 13, 2012 is affirmed. The petition remains denied.